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AUTHORITIES CITED

In the Supreme Court of the United States.

OCTOBER TERM, 1926

No. 95

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

GEORGE A. STORRS, JOSEPH S. WELCH, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the District Court appears at R. 29.

GROUNDS OF JURISDICTION

The judgment of the District Court to be reviewed was one entered March 6, 1925, quashing the indictment. (R. 31.) A petition by the United States for rehearing was filed March 13, 1925 (R. 31), was entertained against the objection of the defendants, and was denied April 8, 1925 (R. 31). The writ of error was applied for April 23, 1925. (R. 50.) That the writ of error was applied for in time is shown in the brief for the United States opposing the motion to dismiss. Another question

treated in that brief is whether the case is one in which direct writ of error is permitted.

On October 31, 1924, an indictment was filed in the United States District Court for the Central Division of the District of Utah against George A. Storrs, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, defendants, charging them in the first count with a conspiracy to violate Section 215 of the Federal Penal Code, and in the second, third, and fourth counts with violations thereof. The conspiracy was alleged to have continued from November 15, 1919, to March 15, 1923. The violations of Section 215 were alleged in the second, third, and fourth counts, respectively, to have occurred on or before November 29, 1921, December 7, 1921, and December 9, 1921. (R. 1, 18, 21, 22, 23.)

On November 15, 1924, *before* the three-year statute of limitations had run on the violations of Section 215, defendants pleaded not guilty. (R 25.) On February 24, 1925, *after* the statute had run, defendants were permitted to withdraw their pleas of not guilty and to plead in abatement. (R. 25.)

The effect of the judgment sustaining these pleas was finally to bar the United States from further prosecution of the violations of Section 215. The judge's certificate (R. 53) sets forth that "by reason of said judgment, the right of the plaintiff to prose-

cute further the offenses charged in said indictment will be lost and plaintiff will be barred from further prosecution of the defendants for said offenses as the Statute of Limitations will be operative." That this is so may be confirmed by the fact that the indictment was filed October 31, 1924 (R. 1), and by reference to the second, third, and fourth counts of the indictment (R. 18–24), which set forth schemes to defraud consummated, respectively, on or about November 29, 1921, December 7, 1921, and December 9, 1921, whereas the order quashing the indictment was entered on March 6, 1925, more than three years later.

Jurisdiction is therefore invoked under the Criminal Appeals Act, Act of March 2, 1907, Chapter 2564, 34 Statutes at Large, 1246, granting a writ of error to the United States "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

Reference is made in support of the jurisdiction to *United States* v. *Thompson,* 251 U. S. 407, in which this Court allowed a writ of error to an order quashing an indictment on the ground that a second grand-jury proceeding had been without leave of court, and that no resubmission to the grand jury could be made without leave of the court. The following quotation from the opinion of Chief Justice White is found at page 412:

> This direct writ of error was then prosecuted under the Criminal Appeals Act of

March 2, 1907, c. 2564, 34 Stat. 1246, both parties agreeing, for the purposes of a motion to dismiss for want of jurisdiction, which we now consider, that under the circumstances here disclosed the authority to review must depend upon whether the quashing of the indictment was a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

As it is settled that this question is to be determined, not by form but by substance (*United States* v. *Barber,* 219 U. S. 72, 78; *United States* v. *Oppenheimer,* 242 U. S. 85), it follows that the fact that the ruling took the form of granting a motion to quash is negligible. Testing, then, the existence of jurisdiction by the substantial operation of the judgment, and assuming for the purpose of that test that the United States possessed the right to submit the indictment to the second grand jury without leave of court, which right was denied by the judgment below, we are of opinion that the power to review the judgment is conferred by the provision of the statute quoted, (*a*) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based.

Here, further prosecution is barred by the statute of limitations; there further prosecution was prevented unless the court consented to resubmission. The case at bar is stronger than the *Thompson case.*

STATEMENT OF THE CASE

The four individual defendants in error were indicted in the United States District Court for the District of Utah for conspiracy to violate Section 215 of the Federal Penal Code, and for violation of that section by using the mails to defraud. They filed substantially identical pleas in abatement alleging—

(1) That one Garnett, though not a witness, had been present in the grand jury room, and

(2) That the district attorney at the close of the testimony before the grand jurors (*a*) restated and summarized some of the testimony which had been given, and (*b*) advised that any indictment if found must be against all of the defendants. (R. 25, 27.)

To these pleas the Government, by leave of court, demurred orally. (R. 32, 33.) The trial court suspended argument and decision of the demurrer pending the taking of evidence in support of the pleas. (R. 33.) Its judgment sustaining the pleas recited that the hearing had been held "upon the demurrers of the plaintiff, and upon the evidence introduced." (R. 31.)

It appeared at the hearing that Garnett was an attorney at law admitted to practice (R. 39), although he had not actually practiced law for twenty years, and that he had been appointed by the Attorney General to be a special assistant to the United States Attorney to assist in the conduct of the case, "including grand jury proceedings." (R. 43–47.) He did nothing in the grand jury room except take stenographic minutes (R. 34, 40), of which he retained one copy and gave one copy to the United States Attorney (R. 40.) One copy was later seen by a defendant in the hands of the Government auditors in the Courthouse. (R. 38.)

Only one grand juror was called as a witness by defendants in error. He testified that the district attorney "made a brief résumé of the salient points of the testimony that had been offered, at the request of the grand jurors" (R. 35), and that again, in response to an inquiry by the grand jurors, he stated that if an indictment was brought, it would have to be brought against all of the defendants (R. 36). The district attorney did not suggest the returning of an indictment at all. (R. 36, 37.)

SPECIFICATION OF ERROR

It is urged that the trial court erred in overruling the demurrers to the pleas, sustaining the pleas in abatement, and entering judgment against the plaintiff. (R. 51.)

SUMMARY OF ARGUMENT

The presence of Garnett in the Grand Jury Room was proper. He was an attorney at law specifically directed by the Attorney General to conduct grand jury proceedings.

The majority of Federal and State Courts have held it proper for a stenographer, even though not an attorney at law duly authorized to conduct grand jury proceedings, to be present in the grand jury room. This doctrine does no violence to the historical secrecy and independence of the grand jury.

The United States Attorney may summarize the evidence for the grand jury and may state what he believes to be the law.

ARGUMENT

I

THE PRESENCE OF GARNETT IN THE GRAND JURY ROOM WAS PROPER

The statute of June 30, 1906, chapter 3935, 34 Statutes at Large 816, provides:

> That the Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magis-

> trates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.

This statute, to which no reference was made in the opinion of the lower court, disposes of this point. The stenographer was an attorney at law, specially appointed a special assistant to the United States Attorney and specifically directed to conduct grand-jury proceedings, and had taken the oath as such. The only possible objection to his presence would appear to be that he was not *conducting* a proceeding. But the assistant who sits beside the trial counsel to take notes is at least assisting in the conduct of a proceeding. It does not alter the situation if the assistant has the knack of writing rapidly—or stenographically. A court should not inquire, after an indictment, just what was done by every assistant district attorney before the grand jury.

II

A Stenographer May Take the Grand-Jury Minutes

FEDERAL DECISIONS

It has been the prevailing view of the lower Federal courts that a clerk or stenographer of the district attorney may properly attend grand-jury hearings and take notes, even though not an attorney appointed by the Attorney General. Justice

Nelson, of this Court, when sitting on circuit in the Northern District of New York in 1852, stated that—

> It is the uniform practice, in the federal and state courts, for the clerk and assistant of the district attorney to attend the grand jury, and assist in investigating the accusations presented before it. That has been the practice, to my knowledge, without question, ever since I have had any connection with the administration of criminal justice. * * * We cannot, at this late day, overturn a uniform practice that has been settled for so long a time. [*United States* v. *Reed*, 2 Blatchford, 435, Fed. Cas. No. 16,134 in 27 Fed. Cas. 727, 734.]

The practice which was general in 1852 is even more important to the administration of criminal justice in our day, when the complexity of crime makes it desirable that the district attorney should have the assistance in many cases of a clerk or stenographer. This was recognized by the Circuit Court of Appeals for the Second Circuit in *Wilson* v. *United States* (1916), 229 Fed. 344, 347, 348. The opinion recognizes "the sanction of secrecy which the common law has always given to proceedings before grand juries," but "we are satisfied that the preservation of an accurate record of the testimony submitted to a grand jury tends to advance the ends of justice," and to hold otherwise "would seem like a reverter to strict technicalities, overattention to which sometimes tends to

defeat rather than to advance the ends of justice." Accord:

> *United States* v. *Simmons* (1891, S. D. N. Y.), 46 Fed. 65;
>
> *United States* v. *Rockefeller* (1914, S. D. N. Y.), 221 Fed. 462;
>
> *United States* v. *Morse* (1922, S. D. N. Y.), 292 Fed. 273;
>
> Dictum in *United States* v. *Heinze* (1910, S. D. N. Y.), 177 Fed. 770.

A contrary view was taken in the Fifth Circuit in *Latham* v. *United States* (1915), 226 Fed. 420, a case which is distinguishable from the case at bar in that the stenographer was not an attorney appointed by the Attorney General. That compliance with the Act of 1906 might alter the situation was expressly recognized in the opinion, at p. 423, as also in *United States* v. *Rubin* (1914, D. C. Conn.), 218 Fed. 245, 250, in which Judge Thomas said:

> I find that this stenographer was not an attorney at law specially appointed by the Attorney General under any provision of law.

These cases may therefore be taken rather as authorities for the Government in the case at bar, without conceding the correctness of their view that the use of a stenographer as in the case at bar is justified only by his appointment under the Act of 1906.

The only remaining Circuit Court of Appeals which has considered the question—that of the

Sixth Circuit—follows the Second Circuit. *Wilkes* v. *United States* (1923), 291 Fed. 988, 992:

> We agree with the Circuit Court of Appeals for the Second Circuit that the preservation of an accurate record of the testimony submitted to the grand jury tends to advance the ends of justice * * *.

The obvious handicap to district attorneys in their prosecution of the criminal law under modern conditions may properly be considered. To overturn the rule prevailing in the majority of the Federal courts would be to take a step backward which would be justified only if the practice of employing a stenographer results in prejudicial injury to defendants. No charge of prejudice is or could be made in the present case. The propriety of the rule which excludes from the grand jury room unauthorized persons who take an active part in examining witnesses or influencing the jury is not questioned, but the distinction between such a case and this case is noted in *United States* v. *Heinze*, *supra*.

STATE AUTHORITIES

The weight of authority in the State courts also supports the doctrine that the presence of a stenographer in the grand-jury room to assist the prosecutor does not prejudice the defendant nor otherwise invalidate the indictment. Indictment sustained:

> *State* v. *Bates* (1897), 148 Ind. 610, 48 N. E. 2 (although State statute expressly pro-

vided that grand-jury clerk should take minutes).

State v. *Brewster* (1898), 70 Vt. 341, 40 Atl. 1037.

State v. *Sullivan* (1904), 110 Mo. App. 75, 84 S. W. 105.

Commonwealth v. *Hegedus* (1910), 44 Pa. Super. Ct. 157.

Porter v. *State* (1913), 72 Tex. Cr. R. 71, 160 S. W. 1194.

Richards v. *State* (1913), 108 Ark. 87, 157 S. W. 141 (although State statute provided that only the prosecuting attorney and witness might be present).

Indictment abated:

State v. *Bowman* (1897), 90 Maine, 363, 38 Atl. 331 (only State authority directly contrary to Government view; court's opinion cites no authorities).

Commonwealth v. *Berry* (1906), 29 Ky. Law. Rep. 234, 92 S. W. 936 (under State statute that no one except attorney for commonwealth and witness might be present; even then two judges *dissenting*).

State v. *Salmon* (1909), 216 Mo. 466, 115 S. W. 1106 (stenographer was also a witness for prosecution and remained to take minutes; distinguishable therefore from case at bar).

Discussion in the State courts turned chiefly on the question whether the principle of secrecy of grand jury proceedings required the exclusion of a government stenographer. The Indiana, Vermont, and Pennsylvania cases point out that this secrecy

is preserved for the benefit of the Government to prevent the danger of escape by the person being investigated, to secure freedom of deliberation to the grand jurors, and to prevent perjury. See also *State* v. *Wood* (1900), 112 Iowa, 484, 84 N. W. 503; *Little* v. *Commonwealth* (1874), 25 Grattan 921, 931; 1 *Chitty, Criminal Law,* 317; 1 *Greenleaf on Evidence* (16th Ed.), Sec. 252.

The principle of secrecy is entitled to respect but not to blind awe. It is to subserve, not to obstruct, the administration of justice. The admission of a stenographer to the grand-jury room during the taking of testimony serves the same ends. It may prove an effective deterrent of perjury. It does not interfere with the free deliberation of the grand jury. As the minutes are available only to the grand jury and the prosecution, it will not assist the party being investigated to escape. On the other hand, it aids materially in the proper and exact investigation of a long case and may serve as much to protect the accused as the State against perjury in the grand-jury room or misunderstanding of the evidence by the grand jurors. And after the finding of a true bill it makes available to the district attorney the results of the grand inquest in his district. The same rule which permits his attendance upon the grand jury should, for all practical purposes, allow him a record of the inquest. The modern rule is to exclude all those whose presence may prejudice the accused but to admit the mere scribe or stenographer, characterized in

United States v. *Heinze*, 177 Fed. at p. 772, as "necessary or convenient in the same way as is a piece of furniture."

III

The United States Attorney May Summarize the Evidence for the Grand Jury and May State What He Believes to Be the Law

The conduct of the district attorney before the grand jury is not mentioned in the opinion of the court below (R. 29), but as it is given as a ground of abatement in the pleas, it will be noticed in this brief. Each of the acts to which objection is made were done by the district attorney at the request of the grand jurors (R. 35–37). He summarized the evidence in "a very brief outline * * *, possibly didn't take more than three or four minutes." According to the memory of the only grand juror who testified, when the district attorney was asked by the grand jury, he expressed the opinion that all of the defendants should be indicted, or none. (R. 36.) He did not urge the indictment. (R. 36, 37.)

The statement of the district attorney could only have meant that if the evidence involved some of the defendants in the conspiracy or substantive offenses, it involved them all. Whether he was right or wrong is not disclosed, because the evidence before the grand jury is not here. For all that appears, he was right, and no prejudice resulted.

The proper limits of a district attorney's conduct before the grand jury have been developed by the lower Federal courts. The line is now drawn between urging an indictment or dominating the grand jury, on the one hand, and presenting the evidence, stating the case, and acting as impartial legal adviser on the other. This line is a practical one and should be confirmed. It protects the independence of the grand jury, but does not reduce the district attorney to the position of a mere automaton or require the grand jury to make constant trips to the courtroom for guidance. In *United States* v. *Mitchell* (1905, D. Oreg.), 136 Fed. 896, 907, it was said:

> The district attorney may explain both his case and his law to the jury.

So in *United States* v. *Cobban* (1904, D. Montana), 127 Fed. 713, 722:

> He stated the facts he expected to establish and explained the law applicable. * * * The prosecuting officer is presumed to be learned in the law. I deem it within his province to explain both his case and his law to the jury, but reserving always to the jury the right, when in doubt, to call upon the court.

We find in a recent opinion by Judge A. N. Hand in the Southern District of New York a practical reference to a summation of the evidence by the district attorney:

> What reasonable objection can be urged against allowing the man who has prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken, perhaps, over weeks or months, and reading from the minutes and giving them a list of the names of the persons charged with the crime? Any objection is really, if not ostensibly, based on the supposition that grand juries are devoid of all independence and prosecuting officers are either tyrannical or dishonest. [*Rintelen* v. *United States* (1916), 235 Fed. 787, 791.]

The contrast of conduct is represented by *United States* v. *Wells* (1908, D. Idaho), 163 Fed. 313, 319, in which the district attorney "without request * * * made an extended address in which he discussed the law and the facts, and several of the jurymen were frank enough to say that they understood the object to be the finding of an indictment against these defendants."

That the giving by the district attorney of mistaken advice is not misconduct, is indicated in *United States* v. *Haskell,* 169 Fed. 449, 451:

> At the close of the first case, the attorney for the government, at the instance of the grand jury, stated the law claimed by him to be applicable to the crime being investigated, and, it is contended, stated it inaccurately in some particulars. * * * It is not to be expected that any grand juror after the lapse of several months would be able to accurately repeat the propositions of

> law so stated with all of their qualifying phrases. But, if we are to assume an inadvertent error, this can not be magnified into misconduct.

It is submitted that this represents a sound viewpoint applicable to the present case. It is a necessary corollary of the district attorney's duty to advise the grand jury as to law that his advice may at times be mistaken.

Other authorities on the duty of the district attorney before the grand jury support these views:

> *Field's Charge to the Grand Jury* (1872, D. Calif.), 2 Sawyer 667, Fed. Cas. No. 18—255 in 30 Fed. Cas. 992, 993.
>
> *In re District Attorney* (1872, W. D. Tenn.), Cas. No. 3925 in 7 Fed. Cas. 745, 746.
>
> *Bishop's New Criminal Procedure* (2d Ed.), Sec. 861.

It is respectfully submitted that the judgment of the District Court should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General.

WILLIAM D. WHITNEY,
Special Assistant to the Attorney General.

NOVEMBER, 1926.

(25)

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

FOR CHARLES M. CROFT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 95

THE UNITED STATES OF AMERICA, Plaintiff in Error.

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

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(31,109)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 95

THE UNITED STATES OF AMERICA, Plaintiff in Error.

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

MOTION TO DISMISS FOR CHARLES M. CROFT

And now comes the defendant Charles M. Croft, by his counsel, M. E. Wilson, Dan B. Shields and A. R. Barnes, and moves this court to dismiss and quash the writ of error herein, on the following grounds, to-wit:

1. That this court is without jurisdiction to review the decision or judgment made and entered by the United States District Court for the District of Utah in said action by means of a writ of error, because:

   A. Said writ of error is not authorized or allowed to the plaintiff in error by any law of the United States.

B. Said writ of error was not taken within thirty days after the decision or judgment had been rendered by the United States District Court.

2. Said writ of error has not been diligently prosecuted, in that it affirmatively appears from the record that the judgment or decision was rendered on March 6, 1925; that the writ of error was not taken until April 23, 1925; that the record was not filed in this court until May 1, 1925; that since said last named date the plaintiff in error has permitted said cause to remain in abeyance in this court; that the record in said cause was not printed until August 19, 1926.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,

Attorneys for defendant,
Charles M. Croft.

(31,109)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 95

THE UNITED STATES OF AMERICA, Plaintiff in Error.

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

FILED_____

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,
Attorneys for Defendant in Error,
Charles M. Croft.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR FOR CHARLES M. CROFT.

STATEMENT.

The Government brings error to reverse a judgment made and entered on March 6, 1925, by the United States District Court for the Central Division of the District of

Utah, abating an indictment theretofore found against the defendants above named.

The defendant Croft has made a motion to dismiss said writ of error on the grounds that said writ is not authorized by law; or if authorized, that it was not taken in time; or if authorized and taken in time, then it fails for want of diligence in its prosecution.

The United States District Court for the Central Division of the District of Utah has two terms in each year prescribed by law, as of the second Monday in April and as of the second Monday in November. (Judicial Code Section 109.)

The proceedings in the case at bar commenced in said Court in the April term of 1924 and continued during and through the November term of that year and ended in the April term of 1925.

Said proceedings may be summarized as follows:

PROCEEDINGS AT APRIL TERM, 1924.

October 31, 1924. Finding of Indictment.

Grand Jury returned indictment containing four counts against defendants. First count charged conspiracy. Other counts charged unlawful use of mails. Statutes alleged to have been violated. (U. S. Penal Code Sections 37 and 215.)

> (Neither the validity nor the construction of either of these sections was in any wise involved in the abatement proceedings.)

PROCEEDINGS AT NOVEMBER TERM, 1924.

February 24, 1925. Pleas in Abatement.

Defendants by special leave of court filed pleas in abatement on two grounds:

1. Unlawful presence of stenographer in grand jury room, taking testimony of witnesses in shorthand, and thereafter transcribing same, thereby violating the secrecy of the proceedings.

2. Unlawful interference with grand jury by District Attorney.

A. Summing up testimony in an address to the grand jury.

B. Unlawful presence of District Attorney during its deliberations and instructing grand jurors that they must indict all or none of the defendants.

February 25, 1925. Hearing of Pleas in Abatement.

Testimony taken. Not disputed that E. M. Garnett acted as stenographer; took testimony of witnesses in short-hand; dictated short-hand notes to typist who made transcripts of same for use by District Attorney and other officers of the Government.

Not disputed that District Attorney gave a resume of testimony in a brief address to the grand jury and after the grand jury had entered upon its deliberations, the District Attorney, at the request of some of the members of the grand jury, returned to the grand jury room and in answer to an interrogatory propounded by some one of the grand jurors instructed all of the grand jurors that they must indict all or none of the defendants.

March 6, 1925. Judgment Abating Indictment.

The court sustained pleas in abatement and quashed the indictment as to each of the defendants.

March 13, 1925. Petition of Government for Rehearing.

Government filed what it called a petition for rehearing, alleging in substance that the pleas in abatement should be reheard because new indictments would be barred by the statute of limitations.

(Defendants say that a petition for rehearing or even a motion for new trial was not authorized by any law of the United States in these abatement proceedings.)

April 8, 1925. Petition for Rehearing Denied.

Defendants objected to the court entertaining the petition for rehearing on the ground that there was no

authority of law for the same. Court over-ruled said objection and denied petition.

April 11, 1925. Last Day of November, 1924, Term.

April 13, 1925. First Day of April, 1925, Term.

PROCEEDINGS AT APRIL TERM, 1925.

April 23, 1925. Bill of Exceptions.

The court settled bill of exceptions proposed by Government; settlement was consented to by attorneys for all defendants. Consent was given April 23, 1925, after adjournment of November, 1924, term.

(The court had no power to settle bill at April, 1925, term, even though it was consented to. Exporters v. Butterworth, 258 U. S. 365; 66 L. Ed. 663.)

Bill contains:

1. Demurrer ore tenus of Government to the effect that pleas in abatement did not allege prejudice or injury to the defendants and were uncertain for want of allegations of fact as to prejudice.

2. All evidence offered by defendants and by Government.

3. Order of court settling bill of exceptions dated April 23, 1925.

April 23, 1925. Petition for Writ of Error.

The government filed its petition for writ of error reciting in substance that judgment was made and entered as aforesaid and praying for the writ of error herein. The court allowed said petition on April 23, 1925.

(Defendants say that this petition was not taken in time under Act of March 2, 1907. Judgment was entered March 6, 1925. Petition for rehearing not effective for the purpose of extending the thirty days prescribed.)

April 23, 1925. Assignments of Error.

Government served and filed assignments of error alleging in substance:

1. Error in denying petition for rehearing.
2. Error in over-ruling demurrer of Government.
3. Error in sustaining pleas in abatement.
4. Error in entering judgment in abatement.

April 23, 1925. Judge's Certificate.

Trial Court, at request of Government, certified that he sustained pleas in abatement "for the reasons and upon the grounds set forth in said pleas" and that he denied the petition for rehearing in said cause "for the same reasons and upon the same grounds although by reason of said judgment, the right of the plaintiff to prosecute further the offenses charged in said indictment will be lost and the plaintiff will be barred from further prosecution of the defendants for said offenses, as the statute of limitations will be operative". The court made an order that this certificate be made a part of the record. *Defendants did not consent thereto.*

(Defendants say that this certificate is not authorized by law. It cannot be considered by this court as a part of the record. Even if considered, it serves no function. The Trial Court might as well have certified that he declared the law regardless of the consequences of such declaration.)

April 23, 1925. Writ of Error and Return.

Issued by Clerk of District Court. Allowed by Trial Judge. Returnable May 7, 1925, instead of within sixty days from date as required by Statute.

April 23, 1925. Citation.

Served and filed. (Not set out in record.)

May 1, 1925. Case Docketed in this Court.

August 19, 1926. Record Printed and Filed in This Court.

(This fact not shown by printed record itself. Reference is made to the records of the clerk of this court. Delay by Government in prosecuting this writ of error appears without explanation or excuse.)

ARGUMENT.

Point One.

The Writ of Error is not Authorized by any Law of the United States.

Unless it comes within the terms of the Act of March 2, 1907, then the Government has no right of review.

Act of March 2, 1907.

> "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when defendant has not been put in jeopardy. The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." 1909 Supl. Fed. Stats. Anno. 292.

BASIC STATUTES.

Section 37 of the Penal Code of the United States provides:

> "If two or more persons conspire either to commit any offense against the United States, or to de-

fraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 215 of the Penal Code of the United States provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle", or "counterfeit-money fraud", or by dealing or pretending to deal in what is commonly called "green article", "green coin", "green goods", "bills", "paper goods", "spurious Treasury notes", "United States goods", "green cigars", or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any postoffice, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered

by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

The gist of the offense defined in Section 215 is the improper use of the mails. Such improper use is charged in counts 2, 3 and 4 of the indictment in the case at bar, and the offense of conspiracy defined by the above quoted Section 37 to violate Section 215 of the Federal Penal Code is charged in count 1 of said indictment.

It is alleged in said first count that the "defendants continuously throughout the period of time from about the 15th of November, 1919 to the 15th day of March, 1923, at Salt Lake City in Salt Lake County, in the State and Central Division of the District of Utah, and within the jurisdiction of this court, knowingly, willfully, unlawfully and feloniously have conspired to commit an offense of the United States of America, to-wit, to violate Section 215 of the Federal Penal Code." (R. I.)

From this language it can be seen that the Government was charging the continuous operation of a conspiracy to violate the law of the United States. The statute of limitations of three years could not have run against the charge contained in the first count until March 15, 1926.

The defendants did not plead any statute of limitations. In fact the defendants never even suggested such a defense. Whatever appears in this record relative to the statute of limitations was brought into the record by the Government after the judgment in abatement was made and entered.

The matter pleaded by the defendants in their pleas did not go to the merits of the case at all, either in form or substance. It did not attack the validity of either Section 37 or Section 215, above quoted, and it did not invoke a construction of either of said sections, either directly or indirectly.

The matter pleaded by the defendants in their pleas was strictly in abatement of the particular indictment before the court. It was to the effect that the particular indictmen had been illegally procured. It was not only designated

as a plea in abatement, but it was properly and legally so designated. In every case which the defendants cited in support of their contentions the question raised by the defendants was disposed of by the courts, either on a motion to quash or on a plea in abatement.

United States v. Edgerton; 80 Fed. 374.
(D. C. Montana. April 21, 1897.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Rosenthal; 121 Fed. 863.
(C. C. N. Y. March 17, 1903.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Heinze; 177 Fed. 770.
(C. C. N. Y. January 22, 1910.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Rubin; 218 Fed. 245.
(D. C. Conn. October 27, 1914.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Railway Company; 221 Fed. 683.
(D. C. Penn. March 12, 1915.)

(Unauthorized person before grand jury. Motion to quash sustained.)

Latham v. United States; 226 Fed. 420
141 C. C. A. 450.
(C. C. A. Fifth Circuit. October 4, 1915.)

(Stenographer present with grand jury. Motion to quash overruled by Trial Court. Sustained by Court of Appeals.)

These cases all hold that the matter pleaded by the defendants in the case at bar does not go to the merits of the offense charged but merely to the legal propriety of the particular indictment before the court.

May v. United States; 236 Fed. 495.
(C. C. A., Eighth Circuit, Sept. 4, 1916.)

> "The question whether a person not authorized appeared before the grand jury returning the indictment may be raised by motion to quash, although plea in abatement is the proper remedy in all cases of contested fact."

In view of the charges made in the pleas in abatement the counsel for defendants were justified in assuming that at least some of the facts charged would be disputed, and therefore pleas in abatement and not motions to quash were filed in accordance with the practice laid down by the Circuit Court of Appeals of the Eighth Circuit in the May case.

In the case of Wilkes v. United States, 291 Fed. 988, decided by the United States Circuit Court of Appeals for the Sixth Circuit June 29, 1923, the defendants pleaded "not guilty", and during the trial before the petit jury *upon the merits*, moved that they be discharged because of the alleged unauthorized presence of a stenographer before the grand jury. Of course that motion was overruled, as was a motion in arrest of judgment for the same reason.

This court thereafter denied an application for a writ of certiorari in the Wilkes case, 263 U. S. 716. (See comment of Trial Court in case at bar, R. 29.) Certainly no one ought to contend, and in the case at bar no one did contend, that the presence of a stenographer before a grand jury finding an indictment, whether legal or illegal, could affect either the guilt or innocence of the defendants in this case or in any other.

Byrne, Federal Criminal Procedure, Section 370.

> "The United States can have a writ of error when an indictment is quashed, or set aside, or a demurrer sustained, when such action is predicated on the construction or constitutionality of the statute. Outside the right granted by the above mentioned statute, the United States has no appeal in criminal cases."

(The author is referring to the Act of March 2, 1907.)

Again quoting from the same section, Mr. Byrne says:

> "Where it does not appear that the judgment sustaining the demurrer turned upon any controverted

construction of the statute, the Supreme Court is without jurisdiction under the Criminal Appeals Act. But where an indictment is quashed on a finding that facts alleged are not within the statute, the United States has an appeal. But where it does not appear on what ground an indictment has been dismissed, the writ of error will not be entertained."

These quotations from this author are made for convenience, and they state clearly the substance of the holdings of this court.

No decision of this court authorizes this writ of error. On account of the fact that the district attorney, during the course of the proceedings, cited United States v. Thompson, 251 U. S. 407, we anticipate that the Government predicates its right to a writ of error upon that decision. It was decided March 1, 1920. Mr. Chief Justice White rendered the opinion. Certain charges were made to one grand jury which failed to indict. The same charges were re-submitted to another grand jury without leave of court. The second grand jury found an indictment. And the trial court held that the submission to the first grand jury and the failure of that first jury to indict was a bar to a re-submission to the second grand jury, unless special leave of court for such re-submission was first had and obtained.

This court held that the decision of the trial court was reviewable in this court under the Act of March 2, 1907, because the plea of the defendants while in form a plea in abatement was in substance a plea in bar.

In the case at bar the trial court held merely that the indictment had been illegally obtained because of the unauthorized presence of a stenographer in the grand jury room during the taking of the testimony by the grand jury, and because of the misconduct of the United States District Attorney in summing up the evidence to the grand jury after the testimony had been taken, and because the United States District Attorney had interfered with the deliberations of the grand jury and improperly instructed that grand jury that it must indict all or none of these defendants.

It is submitted that the Thompson case, where a bar was set up and sustained by the trial court, and the case at

bar, where further prosecution was in no wise prevented by the trial court, have nothing whatsoever in common, so far as the question of the right to review is concerned.

It is true that a "petition for rehearing" was filed in the Thompson case, and that it was set up in that petition that the result of sustaining the motion to quash would be to bar the right to prosecute further in consequence of the statute of limitations. But the holding of this court was in no wise predicated upon anything that was averred in the petition for rehearing. The statute of limitations was not referred to by this court in discussing or deciding the Government's right to a review under the Act of March 2, 1907.

If the Thompson case is to be construed, as the Government in the case at bar would have it, then clearly the Thompson case is not sound and should be overruled, because if it were given the construction claimed by the Government in the case at bar it would in effect write into the Act of March 2, 1907, *the proviso "that this court may lawfully review all judgments that abate any criminal indictment where it appears that the statute of limitations will operate as a bar to further prosecution under a new indictment."* The merits of such a proviso may be admitted and yet its enactment is for the legislature and not for the court. Without such a proviso, then this court is without power to review.

It is submitted, however, that one cannot read either the briefs or the opinion in the Thompson case without coming to the conclusion that this court merely held that the defendants in the Thompson case set up a plea in bar against a re-submission to the second grand jury because a previous grand jury had ignored the charges contained in the indictment. The defendants in the Thompson case had not been in jeopardy. The substance of their plea was a special plea in bar against the indictment because the first grand jury had refused to indict.

While counsel for defendants in the Thompson case did not admit that the plea filed in that case was one in bar, even they did not contend that it was one in abatement, because they say:

"The defendant's motion to quash the indict-

ment was, strictly speaking, neither a plea in bar nor a plea in abatement." (Brief.)

Counsel for the Government contended in the Thompson case that the plea of the defendants in that case was one in bar but that it was an unlawful plea. (See briefs of counsel.)

The Act of March 2, 1907, has been strictly construed by this court. This court has refused to go behind its literal meaning.

United States v. Weissman, 266 U. S. 377;
69 L. Ed. 334.

In that case the trial court directed the trial jury to render a general verdict of "not guilty", because the indictment was invalid. This action of the trial court took place before any evidence had been offered, before even an opening statement had been made, and it was argued by the Government in this court that the judgment should be treated as in substance sustaining a demurrer to the indictment or quashing it. This court held that the trial court had jurisdiction, saying:

> "We stop at the point of jurisdiction, the want of it would be the only pretext that could be offered for going behind the literal meaning of the statute."

If there is any doubt about our previous contentions with reference to the Thompson case, in and so far as the presence of a stenographer in the grand jury room is concerned, that doubt is entirely removed when we come to look at the aspect of the case relative to the alleged misconduct of the district attorney. The matter pleaded relative to such misconduct is not matter going to the merits but purely in abatement.

State v. Ernster, 179 N. W. 640; 147 Minn. 81
(Supreme Court of Minnesota, Oct. 22, 1920.)

In this case a committee appeared before a grand jury and made statements as to investigations made by a former grand jury, and the Supreme Court of Minnesota held that the indictment should be quashed.

Attorney General v. Pelletier, 240 Mass. 624;
134 N. E. 407

"While it is the duty of the district attorney in appropriate instances to advise the grand jury concerning the law, he cannot lawfully go outside of the bounds of his own province, and cannot rightly attempt to influence them in the performance of their duties, express his own opinion, or make arguments, or justly state any facts which have no relevancy to the guilt or innocence of the person under inquiry, but which may have a tendency to influence the action of the the jury on other grounds."

It was further held that it was improper for the prosecuting officer to attempt to refresh the memory of the grand jurors regarding the evidence before a vote was taken. Quoting from the opinion:

"He (district attorney) cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action. His duty is ended when he has laid before the grand jury the evidence and explained the meaning of the law. The weight and credibility of the evidence is wholly for the grand jury. He should refrain from expressing an opinion on the facts even if asked. The grand jury ought not to delay action upon cases heard by them until their memory has become so misty or blurred as to require a rehearsing of it from any one. For the district attorney to make such statement is to substitute his memory for recollection of the grand jurors and is to that extent to usurp their function. Such conduct on the part of a prosecuting attorney is as reprehensible as to offer direct advice concerning the issues depending for decision by the grand jury. It affords abundant opportunity for craftiness and insidious influence. It is subversive of fundamental principles of the grand jury procedure for the district attorney or his assistants thus to participate in its deliberations and discussions. Office and Duty of Grand Jurors by Davis, 20, 21; United States v. Wells (D. C.) 163 Fed. 313; United States v. Rintelen (D. C.) 235 Fed. 787; Le Barron v. State, 107 Miss. 663, 674, 65 South. 648; Commonwealth v. Bradney, 126 Pa. 199, 205, 17 Atl. 600; Maginnis

Case, 269 Pa. 186, 197, 198, 112 Atl. 555. See cases collected in 20 Cyc. 1338."

Clearly it was the duty of the trial court to prevent unlawful interference with the grand jury in its deliberations. We do not in any respect attack the good faith of the eminent district attorney in the case at bar, but we do say that the undisputed evidence shows that his conduct was unlawful, and, if such conduct is permitted in a district attorney acting in good faith, then, of course, it is permitted to every district attorney, even to such as was removed from office in the case of Attorney General v. Pelletier.

The mere fact that the trial court quashed the particular indictment on account of the misconduct of the district attorney in summing up the evidence and in instructing the grand jury that they must indict all or none, did not bar further prosecution of these defendants. Such misconduct merely abated the particular indictment. That and nothing more. For these reasons we submit that the writ of error is not authorized by any law of the United States.

Point Two.

The writ of error, even if authorized, was not taken within time.

The Act of March 2, 1907, requires that the writ of error shall be taken within thirty days after the decision or judgment has been rendered, and shall be diligently prosecuted and shall have precedence over all other cases.

The judgment in this case was rendered on March 6, 1925. (R. 31) The writ of error was not allowed until April 23, 1925. (R. 50) It is true that on March 13, 1925, a petition for rehearing was filed. It is true that the trial court overruled the objection of the defendants made upon the ground that there was no authority of law for such a petition, and then denied the petition on April 8, 1925. (R. 31-32.) The defendants contend that the application of the Government for the so-called "rehearing" was a nullity and that consequently it did not have the effect of extending the time within which a writ of error could be taken.

A rehearing, properly speaking, may be had in appellate proceedings in law or in equity, and a rehearing is also

authorized in trial courts in the equity practice, but it has never been authorized in trial courts in law cases.

New trials grew out of the English Common Law system of trial by jury. Neither new trials nor rehearings have ever been authorized in abatement proceedings. In some states new trials are grantable only in cases tried by jury, and in the federal courts new trials apply only to jury cases.

Revised Statutes, Sec. 726
U. S. Compiled Statutes, 1916, Sec. 1246.

This statute reads:

> "All of said courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law."

This was a part of the Judiciary Act of 1789. In 1919 there was added to it the following amendment:

> "On the hearing of any appeal, certiorari, writ of error or motion for new trial in any case, civil or criminal, the court shall give judgment after the examination of the entire record, without regard to technical errors, defects or exceptions not affecting the substantial rights of the parties."

Fed. Stat. Anno. Supp. 1919, p. 231
Chandler v. Thompson, 30 Fed. 38.

With reference to this statute it was said in the above case:

> "The statute conferring jurisdiction upon the federal courts to grant new trials expressly provides that such power should be exercised 'for reasons for which new trials have been usually granted in courts of law.' This provision applies only to jury trials and is directory to the courts, to be governed by the rules and principles of the common law."

If the Government intended, by its application for a "rehearing", to move for a new trial, then the defendants say that there has been no trial such as is a prerequisite

to a motion for a new trial. If that petition for rehearing was intended merely for the purpose of bringing into the case some matter entirely extraneous to the matters involved in the pleas in abatement, such as the statute of limitations, then it is submitted that it was wholly and entirely improper and cannot function to the extent of extending the thirty days prescribed by the Act of March 2, 1907.

Luke v. Coleman, 34 Utah 383; 113 Pac. 1023.

In the case just cited a motion for a new trial had been overruled by the district court and then the defeated party filed what he called "an application for a rehearing". By this means the plaintiff sought to suspend the finality of the judgment until the petition for rehearing was overruled. The Supreme Court of Utah held:

> "We think the district court had not the power to entertain such a motion. It is unknown to our practice."

The Supreme Court of Utah quoted from the California Supreme Court as follows:

> "The foundation of this rule is that the modes in which a decision may be reviewed are prescribed by statute, and the courts are not at liberty to substitute other modes in their places."

Carpenter v. Superior Court, 75 Cal. 596; 19 Pac. 174

Montgomery-Ward v. Banque of Belge, 298 Fed. 446

The Circuit Court of Appeals of the Ninth Circuit says:

> "It is questionable, at least, whether such a motion, filed for such a purpose, would suspend the time for suing out a writ of error. If the contention is sound, a litigant in the court below may file a motion for new trial at any time before the expiration of a year from final judgment, or six months after the expiration of the time allowed by law for suing out a writ of error from this court."

If the procedure adopted by the Government in the case at bar is authorized, then a plea in abatement may be heard before the court at the commencement of a term, and if that

plea is sustained, the Government may file a petition for rehearing, socalled, at any time during the term, which ordinarily lasts six months, and thereby keep the prosecution pending, without in any manner presenting the questions involved to this court by means of a writ of error.

Suppose a plea in abatement or motion to quash is denied and the defendant is thereafter tried and convicted. As we understand it, it is settled law that while the defendant may review the ruling of the trial court in overruling the motion to quash or in denying the plea in abatement, still the defendant cannot raise such a question on a motion for new trial. The defendant's only remedy is by means of a writ of error to the proper appellate court, for the reason that of necessity there can be no new trial because of errors made in refusing to quash an indictment, which is the basis of the first trial. If the indictment is invalid there never could be a trial. Consequently, there could be no "*new trial.*"

Even if this is regarded as a "rehearing", the action of the court on such a "rehearing" is not reviewable on appeal.

Iron Company v. Toledo, 62 Fed. 169

McLeod v. New Albany, 66 Fed. 379

These cases, and those cited in the opinions of such cases, make it clear that a petition for rehearing in equity is not founded in matter of right, but is addressed to the sound discretion of the Court, and the exercise of that discretion cannot be assigned as error.

> (What becomes of the Government's assignment of error that the Court erred in denying the plaintiff's petition for rehearing?)

For these reasons we submit that the writ of error, even if authorized, was not taken within the time prescribed by the Act of March 2, 1907.

Point Three.

Writ of error fails for want of diligence in prosecution.

Upon this point little need be said. The record presents an open violation of the terms of the Act of March 2, 1907.

That Act requires a writ of error within thirty days. It expressly provides for diligence in prosecution and that the case shall have precedence over all other cases, and yet, although this case was docketed in this court on May 1, 1925, the Government has seen fit to allow the cause to remain in abeyance until August 19, 1926. Sub-division 9 of Rule 10 of this Court provided:

> "The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely and of the parts of the records which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party."

This praecipe was required as a guide to the clerk of this court in printing the record. No such praecipe was ever served upon the defendants. Sub-division 9 of Rule 11 of this Court now requires such a praecipe either at the time the record is filed or within fifteen days thereafter. This new rule has been effective since July 1, 1925.

The defendants submit that the writ of error fails for want of prosecution.

Point Four.

This Court cannot consider, as a part of the record, the Judge's certificate. (R. 53.)

This certificate was made by the trial court at the April term, 1925, without the consent of the defendants. The trial court had no power to make the certificate. It amounts to nothing in any event. It in effect says that the trial court sustained the pleas in abatement on the grounds set forth therein, although the statute of limitations will be operative as against any further prosecution. If these pleas in abatement were properly sustained, then, of course, the mere fact that the statute of limitations had run against new prosecutions need not have concerned the trial court any further than to make him exceedingly careful. This writ of error does not seek to review the recital contained in the certificate. It is nothing more than a recital. The trial court had no power to hold that the statute of limitations

had run against a further prosecution of the offenses charged in the indictment, because such power was never invoked. As a matter of fact, an examination of the first count, charging conspiracy, to our minds shows that the statute of limitations could not have run against such charge until March, 1926. The conspiracy charged was a continuing one, and continued, according to the allegations of the first count, until the fifteenth day of March, 1923. Applying the three year statute, it seems clear that the recital contained in the Judge's certificate was not true. Whether true or untrue, such a recital was a mere gratuity which the defendants were not bound to accept. Such a gratuity "bindeth none, not even the lips that utter it," it cannot serve to give a review in this court when no review is authorized by law.

For these reasons it is respectfully submitted that the writ of error should be dismissed.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,
Attorneys for defendant,
Charles M. Croft.

(31,109)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 95

THE UNITED STATES OF AMERICA, Plaintiff in Error.

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

NOTICE OF SUBMISSION OF MOTION OF CHARLES M. CROFT.

To the Clerk of the United States Supreme Court:
To the United States of America, and the Honorable Attorney General of the United States, and the Honorable United States District Attorney for the District of Utah, Attorneys for Plaintiff in Error:

Please take notice that on Monday, October 18, 1926, at the opening of the court, or as soon thereafter as counsel can be heard, the motion to dismiss, a copy of which is

printed herein, together with the brief in support thereof printed herein, will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,

Attorneys for Charles M. Croft,
Defendant in Error.

Received copy of this Notice, together with motion and brief in support thereof.

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Attorneys for United States of America.

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 95

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

GEORGE A. STORRS, JOSEPH S. WELCH,
EARL J. WELCH and CHARLES M. CROFT,
Defendants in Error.

Brief of Defendant in Error, Charles M. Croft

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF UTAH.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES.
Attorneys for Defendant
in Error
Charles M. Croft

LEGAL PRINTING CO., SALT LAKE

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Brief of Defendant in Error, Charles M. Croft

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF UTAH.

DEFENDANT'S STATEMENT.

This defendant will be unable to have his contentions orally presented to this Court by counsel, and he is informed that a like inability exists as to the other defendants. If his information in this regard is correct, then he must rely wholly upon his briefs.

REPLY ON MOTION TO DISMISS.

This defendant has contended and still contends that the writ of error in this case should be dismissed on three grounds:

1. That said writ of error is not allowed or authorized by any law of the United States.

2. That said writ of error was not taken within thirty days after the decision or judgment had been rendered by the United States District Court.

3. That said writ of error has not been diligently prosecuted by the Government.

WRIT OF ERROR NOT ALLOWED TO THE GOVERNMENT.

It is conceded, as it must be, that unless this writ comes within the terms of the Act of March 2, 1907, the Government has no right of review. The one authority relied upon by counsel for the Government is the case, United States v. Thompson, 251 U. S. 407.

This defendant has already explained his construction of that case, but the Government in its briefs contends that the case cited is in point and quotes the language of Mr. Chief Justice White in support of its contention. This defendant submits that such language does not justify the contention of the Government, but, on the contrary, makes clear the validity of the contention of this defendant.

In the Thompson case the plea made by the defendant was one in bar where the defendant had not been put in jeopardy. The plea made in the Thompson case was that the Government could not make a second submission of any given matter to a grand jury without first obtaining leave of court for such resubmission. This plea necessarily placed a limitation upon the right of the Government and this plea, when sustained by the Trial Court, was in effect a bar to further prosecution until such leave of court had been obtained. It is submitted that such a limitation (and we are not in any wise referring to the statute of limitations) had in and of itself the effect of a bar. That is the Thompson case, and the language of Mr. Justice White, quoted on Page 4 of the second brief of the Government, cannot be construed otherwise than this defendant contends. That language is:

> "(a) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this

indictment, but as to all subsequent ones for the same offenses, to a *limitation* resulting from the exercise of the judicial power upon which the judgment was based;" (This is a quotation from the opinion and this portion is quoted in the Government's brief.)

But the opinion of Mr. Justice White proceeds as follows:

> "and (b) because a like consequence resulted as to the authority of the district attorney and the powers of the grand jury since the exercise in both cases of lawful authority was barred by the application of unauthorized judicial discretion."

The writer of this brief has italicised the word "limitation." It is unnecessary to say that such word does not in any wise refer to the statute of limitations. It refers only to the application of "an unauthorized judicial discretion."

One can readily see that this bar referred to by Mr. Chief Justice White was in the plea made by the defendant in the Thompson case. In the case being presented the bar, if bar there is or was, did not arise from the plea made by Croft or any of the other defendants, but it arose from some fact that was entirely independent of the matters in abatement set-up by Croft, i. e., stating it broadly and assuming for the purpose of argument everything against this defendant, lapse of time had caused the statute of limitations to function and operate.

It is true that the Government did file a petition for rehearing in the Thompson case and did set-up in that petition for rehearing that the statute of limitations would be operative against any further prosecution. These facts appear from the opinion of Mr. Justice White, but the time when this petition for rehearing was filed or the time when it was overruled do not appear from the opinion in the Thompson case and whether the petition for rehearing was overruled and the writ of error taken within the thirty days from the rendition of judgment in abatement is not disclosed by the opinion, and then again, Mr. Justice White, in the opinion of the Court, gives no apparent effect to the matters set forth in the petition for rehearing relative to the statute of limita-

tions. The decision of this Court in the Thompson case was not in any wise affected by the matters set forth in the petition for rehearing in that case. The decision turned upon and rests upon the fact that the plea made by Thompson was a plea in bar without regard to the statute of limitations. It is unnecessary to say that no court will make a judicial construction of a statute that in effect amends it.

It is submitted by this defendant that the construction contended for by the Government in the instant case in effect amends the statute known as the Act of March 2, 1907, so that the Government may have a review of every judgment that abates an indictment, if the statute of limitations has run against a new indictment.

It is pointed out in the brief of the Government that the plea in abatement in the instant case was made "*after*" the statute of limitations had run. This defendant does not concede the statement of the Government as to the first count in the indictment because that count plainly alleges that the defendants "continuously throughout the period of time from the fifteenth day of November, 1919, to the fifteenth day of March, 1923, * * * conspired, combined, confederated and agreed together." Is not this allegation to have force as against the Government?

But even if this construction of the indictment is unsound, still this defendant submits that the discussion is wholly irrelevant and cannot aid the Governmnet in this court in sustaining this writ of error, because it will be noticed from the record that on February 24, 1925, the Trial Court permitted the defendants to withdraw their pleas of not guilty and to file their pleas in abatement. (R. 25) Nothing can be found in the record that shows that the Government in any wise objected to this order of the Court. Silence gives consent . Therefore, the consent of the Government may be presumed as to this order.

If the Government had appeared and objected and shown to the Court that the statute of limitations had run against a new indictment, then perhaps the Trial Court would not have allowed the defendants to withdraw their pleas of not guilty, and would not have allowed those defendants to file their pleas in abatement. This was the point where the Government should have pointed out to the Trial Court that

the statute of limitations would operate as to any new indictment in favor of the defendants and against the Government. Raising such a question then would have been proceeding according to authorized and lawful judicial procedure. An attempt to raise it after the judgment in abatement had been entered by a petition for rehearing, so-called, was not authorized by the law. Neither the Government nor the defendant should be permitted, either expressly or impliedly, to invite error.

Whether the statute of limitations has run or not cannot alter the effect of the Act of March 2, 1907. Pleas are to be construed according to their substance rather than their form, but this substance must be obtained from the pleas themselves—not from some matter in pais or from some extraneous circumstance or from some independent fact.

It is therefore submitted that this writ of error is not authorized by either the Act of March 2, 1907, or by any other law of the United States.

WRIT OF ERROR NOT WITHIN TIME.

The Act of March 2, 1907, says:

> "The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases."

It is perfectly clear that the procedure relative to motions to advance is wholly unnecessary to writs of error taken under such a statute, because the statute itself gives the cases brought to this Court under the Act precedence over all other cases.

The judgment in abatement was entered on March 6, 1925. (R. 31) It was a general judgment. No findings of fact were requested apparently by either party, and that judgment operates as a conclusive determination of all facts necessary to its existence. One may not come into this court and undertake to review facts in order to reverse such a judgment, unless some motion has been made directing the Court's attention to the particular point that the complaining party desires to raise. This rule, it is believed, operates in all Federal Courts.

The so-called "petition for rehearing" is not set out in the record. (R. 31) It was filed on March 13, 1925. (R. 31).

The defendants then appeared and objected to said petition being entertained by the Court on the ground that there is no authority of law for the same. (R. 32)

This objection made by the defendants went to the jurisdiction of the Trial Court to entertain the petition, and it is submitted that the Trial Court could not give itself jurisdiction by erroneously ruling that it had jurisdiction. If the petition for rehearing was unauthorized by the law, then it was void, and the mere fact that the Court entertained a void petition for rehearing cannot give life to such a petition. If the Court had no power to entertain it, then it could be entertained time and time again without legal effect. A void, nonexistent proceeding cannot obtain life and validity from erroneous ruling.

But it is said in the Government's brief, in answer to the motion to dismiss, that even if the action of the Court in entertaining the petition for rehearing was error, it was not void for want of jurisdiction. (Government Brief P. 7) This defendant challenges such a contention. It is unsound in every particular. The Court could not give itself jurisdiction by entertaining a void and unauthorized petition. No person can lift himself even a fraction of an inch from the earth's surface by means of direct action.

But this is hardly the question. It is in effect said in the brief of the Government that the Court had power to modify the judgment in abatement. Perhaps it did have such power at any time during the term at which the judgment was rendered. For the purpose of argument let us assume that fact. Let us assume that the Trial Court could have set this judgment in abatement aside on its own motion at any time during the November term at which it was rendered, and for that reason it could have entertained the unauthorized petition for rehearing and set the judgment in abatement aside.

Does it follow from this assumption that the Government could extend the thirty days allowed for the writ of error in the Act of March 2, 1907, by filing this petition for rehearing and having the Trial Court entertain that petition? *No such*

procedure can extend the thirty days allowed by the statute. The terms of the United States District Court for the District of Utah, for convenience, last six months. A judgment in abatement may be obtained at the commencement of any term, and when obtained thirty, sixty or ninety days may elapse after the entry of such judgment. Then, according to the effect of the Government's contentions on this motion, the Government may allow the thirty days (the time permitted by the statute) to expire and revive that time by filing a petition for rehearing on the last day of the term, at which the judgment was rendered. This, it is submitted, is violating the express provision of the Act of March 2, 1907, which allows only thirty days for the taking of the writ of error.

In order to justify the contention of the Government made upon this phase of the motion the statute should read that the writ of error may be taken at any time during the term at which the judgment in abatement was rendered, and perhaps a party could then take the writ of error at some subsequent term by merely filing the petition for rehearing during the term of rendition and having it continued over into the next term and heard at that term. This was not the intention of Congress when it passed the Act of March 2, 1907.

See Montgomery-Ward Co. v. Banque, 298 Fed. 448.

In this case the Ninth Circuit Court of Appeals said:

> "If a motion for a new trial or petition for rehearing is presented in season and entertained by the Court the time allowed for writ of error or appeal does not begin to run until the motion or petition is disposed of."

Can any such a rule as that just quoted apply to the Act of March 2, 1907? No motion for new trial or petition for rehearing was authorized in the case at bar.

Please note the language of Mr. Circuit Judge Rudkin in the above case:

> "It is questionable, at least, whether such a motion, filed for such a purpose, would suspend the time for suing out a writ of error. If the contention is sound, a litigant in the court below may file a motion

> for a new trial at any time before the expiration of a year from final judgment, or six months after the expiration of the time allowed by law for suing out a writ of error from this court."

In the case cited from the Ninth Circuit it appears that the Trial Court found that the motion was made as an afterthought, because it had been discovered that the time for super sedeas had expired. In the case before this Court it appears that no such petition for rehearing was authorized. To the mind of the writer it does not make any difference whether the Trial Court had power to set the judgment aside or not. Even if the existence of such power is assumed the Government could not extend the thirty days prescribed by the statute by any such means as was adopted in the case at bar.

It is therefore submitted that this motion should be sustained on the ground that the writ of error was not taken within the thirty days allowed by statute.

WANT OF DILIGENCE.

The want of diligence in prosecuting this writ of error is apparent. It arises at the very outset of the attempted proceedings. First, the Government filed a petition for rehearing. Second, the Government had its bill of exceptions settled after the expiration of the term at which the judgment was entered when the Court had no power to settle that bill.

Exporters v. Butterworth, 258 U. S. 365;
66 L. Ed. 663

In the case cited, Mr. Justice McReynolds, speaking for a unanimous court, said:

> "Consent of parties cannot give jurisdiction to the courts of the United States (citing authority). The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties."

The bill of exceptions was void, even though settled pursuant to stipulation of counsel. The certificate of the Trial Judge is no part of the record. It is unauthorized by law.

In the next place, this case was docketed in this court

May 1, 1925. Under the Act of March 2, 1907, if it is controlled by that Act, the case should have been diligently prosecuted and it had precedence over all other cases. No motion to advance it was necessary. The Government was the actor. The statute under which the writ of error was attempted prescribed the duty of the person prosecuting, and yet on Page 8 of the Government's brief in answer to the motion to dismiss it is said:

> "The case has taken its regular course since that time. On July 1, 1926, in accordance with the usual practice, the United States, at the request of the clerk, furnished him a requisition for printing the record."

If the course taken by the Government in the prosecution of this writ was "regular", it certainly was not in accord with the Act by which the Government seeks to justify the taking of the writ. One year and several months intervened before the Government furnished the clerk a requisition for printing this record, and this it apparently did at the request of the clerk.

This defendant is not complaining because the Government did not make a motion to advance, but this defendant is complaining because the Government did not prosecute with diligence and did not comply with the terms of the very Act which the Government claims authorizes the writ. This defendant has been on his own recognizance since the judgment in abatement was rendered. One year and many months have intervened since the rendition of that judgment. He surely is not to be charged with defects in the "follow-up" system of the Solicitor General referred to on Page 9 of the Government's brief.

It is therefore submitted that this motion to dismiss should be sustained because of the laches of the Government, which laches is condemned by the Act of March 2, 1907.

ON THE MERITS.

This defendant objects to a consideration of the bill of exceptions appearing on pages 32-49, inclusive, of the record, on the ground that such bill of exceptions was settled by the Trial Court when that Court had no power to settle or allow such bill.

Exporters v. Butterworth, 258 U. S. 365;
66 L. Ed. 663.

In support of this objection this defendant calls the attention of the Court to the record that the judgment in abatement was rendered on March 6, 1925, (R. 31); that the so-called petition for rehearing was overruled on April 8, 1925. (R. 31.) This was during the November, 1924, term of the Trial Court. April 13, 1925, was the first day of the April, 1925, term. (Judicial Code Section 109.) April 13, 1925, was the second Monday in April of that year. For the reasons set forth in the Butterworth case the Trial Court was without power or jurisdiction to settle the bill of exceptions and therefore the bill must be eliminated.

This defendant makes the same contention to that paper which is entitled, "Judge's Certificate". (R. 53.) It will be noticed that this certificate was not consented to; that it was not made a part of the bill of exceptions; that it brought in matters that were foreign to any proceedings theretofore had in the case. It serves no function. It is void.

If the bill of exceptions is eliminated then there is nothing before the Court but the plea in abatement. If the plea in abatement is good as against demurrer, that ends this proceeding.

Apparently such a thought was possessed by the writer of the Government's brief on the merits, because he sets out only one specification of error, reading as follows:

> "It is urged that the Trial Court erred in overruling the demurrers to the pleas, sustaining the pleas in abatement and entering judgment against the plaintiff." (Government Brief, Page 6.)

It is true that in his argument he undertakes to set forth facts which can be shown to exist only by means of the bill of exceptions. Whether counsel for the Government concede the construction placed upon its specification in error or not, the defendant contends that the only thing which this Court can consider is whether the Trial Court erred in overruling the demurrer of the Government to the defendant's plea in abatement, *and it cannot consider that.* That would be Assignment of Error Number 2 (R. 51). There are four assignments of error. The first assigns error of the Trial Court in denying the plaintiff's petition for rehearing. This, of course, cannot be considered. The third assigns error on

the part of the Trial Court in sustaining the pleas in abatement. It is submitted that such an assignment is insufficient even if the bill of exceptions is not eliminated. Surely it is insufficient with the bill of exceptions eliminated. The Government did not make any request for any findings of fact or for any declarations of law. The attention of the Trial Court was not challenged or directed to any particular point made by the Government. This Court cannot be required to go through the bill of exceptions and *find* some error of the Trial Court, and if this Court is not required to do that, then the assignment is without function.

Assignment No. 4 avers that the Trial Court erred in entering judgment in favor of the defendants. Such a general assignment does not invoke this Court's jurisdiction on a writ of error.

The only remaining assignment is No. 2; that the Court erred in overruling the demurrers interposed by the Government. (R. 51.)

It is true no bill of exceptions would be necessary to test the sufficiency of the pleas as against the demurrer, but the demurrer does not appear except in the bill of exceptions and without the bill of exceptions it cannot be known that the Government demurred, *consequently there is nothing before this Court for review.*

It may be that these contentions are technical, but it seems to the writer that they are sound and that the defendant is entitled to have them made and sustained. The defendant, however, contends that the plea in abatement is, in all respects, sufficient as against demurrer.

DEMURRER PROPERLY OVERRULED.

The plea alleges in substance that Edward M. Garnett and other persons, not members of the grand jury and not lawfully authorized to be and remain with said grand jurors while they were conducting their inquiry, were present with said grand jurors while they were examining the matter of presenting said indictment. It further alleges that Edward M. Garnett was not authorized or appointed in any manner or at all to assist the United States District Attorney in conducting said proceedings. It alleges in substance the presence

of a person who was not a District Attorney representing the United States nor a witness in said cause nor authorized by law to be present. It also alleges that the United States District Attorney substituted his own recollection of the testimony taken for that of the grand jurors and that the United States District Attorney advised the grand jurors that an indictment, if found, must be against all of the defendants. No authority cited by the Government in its brief sustains any indictment as against such an attack.

Neither the United States District Attorney nor any other person can substitute his recollection for that of a grand jury. If this indictment is predicated upon the recollection of the District Attorney and not upon that of the grand jury, then the District Attorney found the indictment and the endorsement of the grand jury that it was a true bill, means nothing.

It is, therefore, submitted that the judgment must be affirmed without giving any consideration to the contentions made by the Government in its brief.

CONTENTIONS OF GOVERNMENT UNSOUND AND PRESENCE OF GARNETT IN GRAND JURY ROOM WAS UNLAWFUL.

The Government cites the Statute of June 30, 1906. (34 Stat. L. 816.) That statute reads:

> "That the Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney-General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (34 Stat. L. 816.)

The Government in its brief says no reference was made to the Statute in the opinion of the Trial Court. The statement contained in the brief of the Government is true in and

so far as the opinion is concerned, except that the Trial Court does use the following language:

> "The distinguishing characteristic of the grand jury system which justified its existence in the past, and, aside from the requirements of the Constitution which justifies its continuance in the future, should not be jeopardized by any strained statutory construction or arbitrary judicial pronouncement in the interest of convenience to government prosecuting or investigating officers."

The words "statutory construction" refer to the identical statute quoted by the Attorney-General. The able District Attorney as well as counsel for defendants presented this statute to the Trial Court, and its citation in the Government's brief is not, in any sense, a surprise. The Trial Court seemed to think that this statute was not intended by Congress to serve the purpose which the Government undertook to make it serve in the case at bar; and that the Government was attempting to make a strained construction of the language used in the section quoted.

It appears from the bill of exceptions that Edward M. Garnett was the acting reporter of the United States Court (R. 39); that there is no official reporter in such a court except in equity cases; that in all other matters he has acted as such reporter; that he was admitted to the bar of the Supreme Court of the State of Utah and to the Federal Court; that he was not practicing law; that he had not practiced law for twenty years; that he was not practicing law at the time the grand jury held its grand inquest in the case at bar (R. 39); that he was not acting as an attorney in the grand jury room; that he took down in shorthand the testimony of the witnesses given before the grand jury; that he transcribed it into typewriting or had it transcribed under his direction; that possibly two different persons took part in transcribing the testimony (R. 40); that he received Ten Dollars per day and Forty-five cents a page for the transcript (R. 49). The Court judicially knew that that was the usual court reporter fee.

Now, from this testimony it can be seen that Garnett was not conducting any legal proceeding before the grand jury; that he was not acting as a district attorney or an assist-

ant to such district attorney in conducting any proceeding and the alleged appointment made by the Attorney-General of Garnett was never acted upon by Garnett. This statute was passed for the purpose of allowing non-resident attorneys who might be experts upon any particular question to go into any district of the United States and conduct legal proceedings in behalf of the United States pursuant to an appointment from the Attorney-General. It was not passed in order to permit some stenographer who may have been admitted to the bar twenty years ago to be present in the grand jury room. The defendant submits that if the presence of Garnett in the grand jury room was lawful, then it was not lawful because of the statute quoted. That statute cannot be made to serve any such a purpose.

In many states court reporters get themselves admitted to the bar, but their ability as accurate stenographers, is not in any wise increased by reason of the existence of their admission certificates. If Garnett's presence in the grand jury room was lawful it was lawful independent of his admission to the bar.

It appears that this statute is being used as a device by means of which a person is allowed to be in the grand jury room for a purpose not intended by the section quoted. This has been said by courts construing it:

> "The question presented, then, is whether, under the guise of appointment of attorneys to conduct proceedings before the grand jury, professional stenographers, who, as in this case, have been admitted to a county bar, may lawfully be present in a grand jury room for the sole purpose of taking stenographic notes of the testimony. (685.)
>
> U. S. v. Phila. & R. Ry. Co., 221 Fed. 683.

It is an old principle of law that one cannot do indirectly that which he cannot do directly. If professional stenographers are authorized to be present in a grand jury room for the sole purpose of taking down the testimony of witnesses, then let it be so declared, but this declaration should not depend upon the fact that such stenographers have been at some time or other admitted to the bar and that they have been appointed by the Attorney-General to conduct proceedings as United States Attorneys.

The greatness of our Government, the frankness of our law and the open-mindedness of our courts will not permit of such indirect purposes on the part of either the plaintiff or of the defendants. Schemes, devices and subterfuges should never be permitted.

For these reasons the writer of this brief ignores a further consideration of this statute, as the Trial Court ignored it. Strain at that statute as you will, torture it as you like, and it does not mean that it authorizes either directly or indirectly the presence of a professional stenographer in the grand jury room for the sole purpose of taking down the testimony of the witnesses.

> U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66. (Decided by the Circuit Court of Tennessee, July 3, 1908).

In the case last cited District Judge McCall construes an alleged appointment similar to the one involved in the case at bar. He holds that the appointment did not make the persons named therein United States attorneys for the District of Tennessee. (Page 72.) He finally considers the effect of the Act of June 30, 1906, and he says:

> "Here we have Congress, after this indictment was found, enacting a law authorizing the Attorney General to do the very thing that was attempted to be done in this case; that is, appoint special assistants to the district attorneys to assist them in discharging their duties in grand jury proceedings. Mr. Gillett, of the House of Judiciary Committee, reported the bill from that committee, and therein said:
>
> 'As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be, and no matter how necessary it may be to the interests of the government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill, to properly present to the grand jury the question being considered by it.'
>
> He understood, and Congress understood, that at that time only the district attorneys had authority to

appear before a grand jury no matter how important the case may be."

In the case being considered by Judge McCall it appeared that Mr. E. T. Sanford and Mr. J. Harwood Graves were not citizens or residents of the middle district of Tennessee but were brought into that district to actually assist the district attorney. They were eminent lawyers and were specially skilled with reference to the case then being investigated. The Trial Court quashed the indictment on the ground of their presence because the Act of June 30, 1906, was not in effect at the time the indictment was found.

A reading of this case and a consideration of the statement of Mr. Gillette who presented the bill makes clear the purpose of the statute.

ORIGIN OF THE GRAND JURY.

The jury itself is a matter of growth in English law. In criminal matters it was used twice in the course of each action. The grand jury was the jury of accusation and the petty jury was for trial purposes. (Vol. 5 Continental Legal History Series, (Esmein) Page 323.) It was essential at the time of the adoption of the Constitution of the United States that the grand jury's proceedings should be secret and it was equally necessary that the secrecy of the proceedings should be protected inviolate and that such proceedings in determining whether an accusation should be made should be lawfully conducted. The right of the accused to the orderly and impartial administration of the law extends even to proceedings had before this jury of accusation.

Wilson v. State, 70 Miss. 595; 35 Am. St. 664.

The writer concedes that perhaps the California method, arising out of the Hurtado case is superior to the proceedings before this jury of accusation.

In the language of Mr. Circuit Judge Sanborn of the Eighth Circuit this California method is said to be, "The best protection against trial without a lawful accusation yet devised." (199 Fed. 32.) But the California method applies to states and is created by state constitutions and cannot be adopted for criminal cases under the law of the United States without an amendment to the Constitution of the United States. If the grand jury system is archaic and not in accord

with the progress of the times, then we should amend our constitution by the method prescribed for amendment, not by judicial construction. We should not attempt, by the latter means, to give to the prosecution many of the advantages to be obtained from the California method without opening up those advantages to the person being accused.

The grand jury and its proceedings should be taken, as they were, at the time the Constitution of the United States was adopted. The institution known as the grand jury cannot mean any different thing today than it meant in 1787.

This Court held, in U. S. v. Thompson: (Supra)

> "That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous, and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury."

It is well settled that the selection of a grand jury is a matter of substance and cannot be disregarded without prejudice to the accused. It is also well settled that grand jurors may not be unlawfully interferred with during the investigation or deliberations without prejudice to the accused.

It is true that the district attorney may assist the grand jury to the extent of examining the witnesses and stating generally the law, but neither the district attorney nor any other person may improperly influence a grand jury. The district attorney may be present during the taking of the testimony, but neither he nor any other person may be present during the deliberations of the grand jury. This presence of the district attorney during the taking of the testimony or of his lawful assistants during that time is not for the purpose of aiding the Government in preparing its case for trial.

It is submitted that the grand jury room is not a mere preparation ground for either the prosecution or the de-

fense. The only reason the district attorney is allowed in the room at all is to aid the grand jury. According to the Government's brief one would come to the conclusion that the district attorney was, by the law, permitted to use the institution known as the grand jury for the purpose of compelling a complete disclosure of the witnesses called before the grand jury; not to aid the grand jury, but to aid the district attorney in preparing his case for trial before the petty jury. If this jury of accusation has no other force or function than to afford the district attorney an excellent opportunity for preparation of his case, then indeed should this old, honorable institution be abolished.

Mr. Holdsworth, in his late work upon English law, says that sometimes a principle, even though archaic, serves the function of preserving the liberty of the citizen. And one thing is certainly true that if professional stenographers may be put into the grand jury room by the prosecution, then it would be much better to open the grand jury room to the general public.

Prior to statehood in the Territory of Utah the Statute prohibited any person being present during the proceedings of the grand jury, except the members thereof, the interpreters and witnesses actually under examination.

The attorney for the people was allowed to be present for the purpose of interrogating the witnesses.

2 Compiled Laws of Utah, 1888, Section 4920.

> "The grand jury may, at all reasonable times, come into court and ask its advice on questions of law, but the judge must not be present in the jury room during the sessions of the grand jury. The attorney or attorneys for the people may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he think it necessary; but no other person is permitted to be present during the sessions of the grand jury except the members, interpreters and witnesses actually under examination, and no person must be permitted to be present during the expression

of their opinion or giving their votes upon any matter before them."

2 Compiled Laws of Utah 1888, Section 4921.

"Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person upon a charge against such person for perjury in giving his testimony, or upon trial therefor."

2 Compiled Laws of Utah 1888, Section 4922.

"A grand juror cannot be questioned for anything he may say, or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors."

This section (4920) was carried into the state law of Utah and up until just a short time before the presentation of the matter involved in the case at bar that was the practice of the United States Court for the District of Utah. For this reason the case of Wilson v. U. S. (229 Fed. 344) does not apply, because, according to Mr. Circuit Judge Lacombe, there had been a long continued practice in the second circuit under which a stenographer had been permitted to be present.

If the question is to be determined by the practice in the particular district where the indictment is found, then the ruling of the Trial Court was in accord with that practice in the Utah District. The Trial Court could not be expected to ignore the practice of the Utah district and follow the practice of the New York District.

Ever since the trial of Lord Shaftesbury, 4 How. State Trials, 183, it has been the practice under English law that this jury of accusation should sit in secret and to justify the finding of an indictment the Grand Jury must be convinced, so far as the evidence goes, that the accused is guilty, or, in

other words, the Grand Jury is not to find an indictment unless in its judgment the evidence before it, unexplained and uncontradicted, would warrant a conviction by a petit jury.

See the Charge of Justice Field, 2 Sawyer, 673.
See also monographic note, 12 Am. St. 900.
State v. Bowman, 90 Me. 363; 60 Am. St. 266.

"We think that in the interests of justice, and in accordance with the principles of public policy, it is wiser to hold that this is a matter which may be taken advantage of by a respondent, than that, although improper and unauthorized, it cannot be made the subject of review.

"Another consideration should not be lost sight of. The object of an investigation by a grand jury is not only to bring the guilty to trial, but also to protect the innocent from groundless accusation. The duties of grand jurors are important and responsible. They should be entirely independent; they should be uninfluenced by any consideration except a desire to 'diligently inquire and true presentment make of all matters and things' given them in charge, according to their oaths and their consciences. If it be competent for the court to order a stenographer to be present and take stenographic notes of the testimony of witnesses for such future use as the court might order or the law allow, it might be done in one case only during a whole session, while all other matters were investigated in the ordinary way. Should that be done, we cannot tell what influence such a discrimination might have upon the jurors. We think that in some cases it might affect their independence, and impair the rights of the accused.

"Our conclusion is, that for the reasons given, the proceeding is unauthorized and improper and that the indictment so found is void."

State v. Bower, 183 N. W. 322; 191 Ia. 713.
decided by the Supreme Court of Iowa on June 21, 1921.

"The grand jury is a secret inquisitorial body. The oath administered to every witness called before it imposes an obligation never to reveal and always to

conceal all matters to which the attention of said witness may be called during his examination.

"It is quite apparent that to permit three witnesses, or any number of witnesses, to remain in the grand jury room during the investigation of a cause would eliminate all secrecy, would convert a strictly private hearing into a public investigation and in the instant case would permit the prosecuting witness to dominate the hearing and make all the testimony conform to his version of the affair. This would be very prejudicial to the rights of the defendant in the event an indictment was returned. Through such means the grand jury system would lose its historical significance as an inquisitorial body and the ancient landmarks which gave to that body its present constitution and functions would be destroyed."

If witnesses not under examination may not be present, then what may be said of the presence of a professional stenographer who makes a permanent record, ordinarily accepted as conclusively accurate, of everything that is said while he is present in the grand jury room?

Statutes in many states have been enacted authorizing the presence of a professional stenographer. The fact that such statutes have been enacted shows that without the statute the presence of a stenographer is unauthorized. The reasons for the secrecy relative to proceedings before grand juries are manifold. One is that the utmost freedom of disclosures of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented. A third is to avoid the danger of escape by the person indicted. A transcript may encourage perjury as well as prevent it. It is a well known fact that many persons will adhere to false statements if there has been a record made of such statements, whereas, if no record has been made the same person will finally disclose the truth.

Grand Jury proceedings are carried on for the purpose of accusing the guilty but also for the purpose of protecting the innocent.

"The grand jury of modern times still retains some traces of antiquity which have been lost to the other varieties of the jury. They consider the ev-

idence in secret and the court does not control or advise them as to their findings in the individual cases which come before them. It merely charges them generally as to the nature of the business which they are about to consider."

1 Holdsworth's History of English Law, 322.

On Page 320 the author says:

"We shall see that many times in the history of English constitutional law the survival of archaic ideas has helped forward the cause of the liberty of the subject."

State v. Broughton, 7 Iredell's Law, 96; 45 Am. Dec. 507.

In this case the Supreme Court of North Carolina discusses the policy of the law and the secrecy of the Grand Jury.

In the case of Leatham v. United States, 141 C. C. A. 250;

Leatham v. United States, 141 C. C. A. 250; 226 Fed. 420; L. R. A. (N. S.) 1916 D.

the United States Circuit Court of Appeals for the Fifth Circuit fully discusses the question, and in the L. R. A. Report there is attached a monographic note which fully covers the ground. It is unnecessary to add anything to the reasoning of the Circuit Court of Appeals of the Fifth Circuit.

State v. Branch, 68 N. C. 186; 12 Am. Rep. 633.

In this case the judge of the Superior Court required the Grand Jury to have the witnesses on the part of the State examined publicly. It is submitted that this was less harmful than the method pursued in the instant case. The Supreme Court of North Carolina, speaking by Mr. Chief Justice Pearson, said:

"The power of the judge to require a grand jury to come into open court and have the witnesses for the State examined, is not only opposed to immemorial usage, but is not sustained either by principle or by authority.

"The province of a grand jury is not to try the party, but to inquire whether he ought to be put on

trial; and the purpose is, to save the citizen the trouble, expense and *the disgrace of being arraigned and tried in public on a criminal charge, unless there be sufficient cause for it.* To this end it is provided by the constitution: 'No person shall be put on trial, except upon a bill of indictment found by a grand jury.' This provision of the constitution was aimed at a prerogative of the crown, under pretense whereof a citizen could be put on trial upon a charge of a criminal offense, upon the information of the crown officer, whereby the good citizens were oftentimes exposed to the scandal and disgrace of being tried in public, when, in truth, there was no sufficient cause to suspect their guilt.

Thus it is seen that the purpose of this provision in the declaration of rights is to protect citizens from the scandal and disgrace of being arraigned and put on trial in public, unless there be sufficient ground for it.

"How does this innovation upon ancient usage comport with this clause of the declaration of rights? It defeats it in *toto.* If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may as well be done on the information of the State's solicitor; for the protection of a grand jury amounts to nothing if the citizen is to be frist exposed to scandal and disgrace by a public examination of the witnesses on the part of the State, in order to see whether he ought to be exposed to the scandal and disgrace of being tried in public on a criminal charge; and if, upon the public examination of the witnesses for the State, he has no right to cross-examine, and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right 'to confront the accusers and witnesses with other testimony and to have counsel for his defense', instead of being, in the first place, put in the condition of a victim tied to a stake, while his reputation is being tortured to death. (Italics in the opinion.)

It is submitted that this is another reason why the Grand Jury proceeds in secret. That jury of accusation was not created for the benefit of the Government. In the days prior to Magna Carta it served one function, but since 1215 and at the time of the adoption of the Constitution of the United States, the institution of the Grand Jury was for the protection of the citizen. It was an independent body authorized to inquire into all matters of a criminal nature. The Grand Jury was not supposed or authorized to reveal that which occurred in its presence. No written memorial was made of the testimony taken before it. The jurors were bound to true presentment make, but they were also bound not to find an accusation against anyone unless the evidence, if uncontradicted, would, in the opinion of the Grand Jurors, justify a conviction by a petit jury.

Until recently no one ever conceived of the idea that the Grand Jury room was a preparation ground for the District Attorney. Until recently no one ever thought that professional stenographers should be present and accurately take in shorthand every word that was uttered while the Grand Jury was making its investigation. The investigation was to be made and if no indictment was found, no cause for accusation found, then for reasons of public policy the whole matter was to be forgotten; but under present views and under the contentions made by the Government in the case at bar, it seems that a written memorial should be made; that it should be turned over to typists and to Government officials and that officers of the Government may disclose, even at public banquets, that which was testified to before the Grand Jury. District Judge Thompson refers to such a circumstance in the opinion to be found in 221 *Fed.* 687, for he says:

> "The appointment of a stenographer to take testimony under guise of an assistant district attorney to conduct proceedings is not without precedent in this district. The wisdom of permitting the testimony to be transcribed and to go into the possession of persons outside of the office of the district attorney may be seriously questioned, as instanced during an investigation within a few years in this district, where the statements of witnesses before the grand jury, having been taken down stenographically, were repeated by an officer of the government, who had not been present

in the grand jury room, but into whose posssession they had come, *at a public banquet.*" (Italics ours).

All the evils that a public hearing would entail are multiplied by a hearing secret in form but stenographically reported, so that a transcript can be made of the shorthand notes and so that such transcript, or its copies, may circulate here, there and yonder for time without end. The Government says in its brief that the weight of authority in the State Courts and the prevailing view in the lower Federal Courts justifies the practice. This defendant challenges that statement. Sound reason and good sense are decidedly against the practice, and wherever a State statute has authorized it, the legislature has been very particular to guard and limit the action of the stenographer. All of the States which have passed statutes authorizing such practice have recognized that the rule was otherwise in the absence of statute.

The case of Wilkes v. United States, 291 Fed. 988. is not in point. In that case the defendant pleaded to the merits and undertook to prevent the use of the transcript by objection, and also undertook to move his discharge because of the presence of the stenographer before the Grand Jury, and also undertook to move in arrest of judgment for the same reason. Of course, his objections and motions were overruled.

The case of Wilson v. United States, 229 Fed. 344. is based upon a practice existing in the New York Circuit for upwards of sixty years. See opinion of Mr. Circuit Judge LaCombe, Page 347.

The practice of the Utah Federal District ever since statehood, and the practice of the Utah Territorial Federal Court, never authorized the presence of a stenographer during the sessions of a Grand Jury. In at least one State it has been held that a statute authorizing the presence of a police officer was unconstitutional.

Opinion of Justices, 232 Mass. 601, 123 N. E. 100. The Supreme Judicial Court of Massachusetts said:

"The grand jury is an ancient institution. It always has been venerated and highly prized in this country. It has been regarded as the shield of in-

nocence against the plottings of private malice, as the defense of the weak against the oppression of political power, and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source. These blessings accrue from the grand jury because its proceedings are secret and uninfluenced by the presence of those not officially and necessarily connected with it. It has been the practice for more than two hundred years for its investigations to be in private, except that the district attorney and his assistant are present. Secrecy is a vital requisite of grand jury procedure. It was said in the recent decision of Commonwealth v. Harris, 231 Mass. 584, at page 586, 121 N. E. 409, at page 410, quoting in part the words of Chief Justice Shaw in Jones v. Robbins, 8 Gray, 329, 344: 'The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.' The above quotation is a declaration and decision that the twelfth article of the Declaration of Rights in part was aimed and intended to prohibit the scandal and disgrace of a trial in public of persons charged with infamous crimes and offenses when, in truth, there was no sufficient cause to suspect their guilt. It is also a declaration that it shall no longer be possible for one or more judges to compel or direct the examination of a witness to be held in open court before the grand jury, should the judges seek to over-awe the latter or the witness by the presence of other witnesses or bystanders, or should he or they be of opinion the prosecution is too indulgently or too vindictively conducted.'

"These essential characteristics of the grand jury would be broken down if a police officer or other person who had investigated the evidence, interviewed the witnesses, and formulated a plan for prosecuting the accused should be permitted to be present during the hearing of testimony. This conclusion follows irresist-

ibly from the two decisions just cited, by which we are bound.

"There is no inherent necessity in the efficient conduct of investigation by the grand jury which justifies such invasion of their proceedings by strangers. The presence of a police officer cannot be justified upon such ground. Indeed the attendance of the district attorney and his assistant subserves every rational purpose which could be accomplished by the proposed bill. The attendance of a police officer would afford opportunity for subjecting witnesses to fear or intimidation, for preventing freedom of full disclosure by testimony, and for infringing the secrecy of the proceedings. Mere rules of procedure practiced by our ancestors at the time of the adoption of the Constitution did not become an inherent part of due process. But no change 'can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.' Twining v. New Jersey, 211 U. S. 78, 101, 29 Sup. Ct. 14, 20 (53 L. Ed. 97)."

One might says that the presence of a police officer would tend to prevent perjury and that it could be presumed that a police officer would not violate the law, but we know as a matter of fact that many public officers, even to judges upon the bench, sometimes use their positions for the purpose of punishing their enemies and rewarding their friends.

The king could do no wrong and yet the creation of this grand jury institution was brought about in order that the subject might have protection from the aggressions of the crown. It is one of the bulwarks of liberty and its ancient landmarks should either be preserved or the Constitution amended and the California system approved in the Hurtado case should be adopted.

Defendant has already cited in his motion to dismiss the cases upon which he relied. As far as the Arkansas case is concerned, cited by the Government, little need be said of it, because it is in direct contravention of the statute of the State of Arkansas.

MISCONDUCT OF DISTRICT ATTORNEY.

It appears from the record, if we are to consider the bill of exceptions, that the eminent District Attorney had concluded the examination of witnesses and then made a short presentation, or, in the language of the witness, a brief resume' of the salient points of the testimony that had been offered. This was done at the request of the Grand Jurors (R. 35). This defendant contends that this brief resume' of the salient points was misconduct, justifying the quashing of the indictment. If the District Attorney could lawfully make a short argument, then he could lawfully make a more extensive and even more ardent one. The Grand Jury room is no place for argument by the District Attorney. It would have been much better to have permitted the Court to have sat with the Grand Jury and then summed up the evidence and charged the jury and expressed his opinion as to the credibility of the witnesses, because it can always be assumed that the presiding judge would be less ardent and less of an advocate than would be the District Attorney whose duty it is to prosecute rather than to preside.

> Commonwealth v. Harris, 231 Mass. 584; 121 N. E. 409
>
> Attorney General v. Pelletier, 240 Mass. 624; 134 N. E. 407.

And again, this record shows that after the District Attorney had given this brief resume' of the salient points and after the Grand Jury had deliberated for some time upon the guilt or innocence of the defendants, and after they had been weighing the evidence by mutual discussion and examination, the District Attorney once more appeared in the Grand Jury room, at the request of some of the Grand Jurors. The District Attorney was asked whether or not it would be possible for an indictment to be rendered against some of the defendants and not the others. (R. 36.)

> "He replied that it would be impossible to segregate the defendants; that if an indictment was brought it would have to be brought against all of them or not any." (R. 36.)

This witness was cross-examined by the District Attorney, Mr. Morris, and this statement quoted was in no wise

shaken by the cross-examination. On cross-examination, the witness said:

> "Mr. Morris made this statement that after we had asked him whether or not it would be possible to render an indictment against some of the defendants and not all he said that an indictment, if brought, would have to include all of the defendants and they could not be segregated." (R. 36.)

In the brief of the Government we find this statement:

> "According to the memory of the only grand juror who testified, when the District Attorney was asked by the Grand Jury, he expressed the opinion that all of the defendants should be indicted or none." (Government Brief P. 14.)

It will be of little avail for counsel for the Government to undertake in any wise to minimize the positive statement of the witness as it is set-forth in the record. Of course, he testified from memory. He spoke out of his recollection, but when the testimony is read from the record one does not get the impression he might derive from reading the quotation just taken from the Government's brief. That quotation indicates that the witness was uncertain. The record shows that he was certain as any witness ever could have been, and the record shows that neither Mr. Morris nor any other witness in any wise disputed the testimony given by the Grand Juror Wilcox. Mr. Morris was the District Attorney. Mr. Morris could have taken the stand and disputed the statement of Wilcox, and when the District Attorney did not do that, everyone must presume that the testimony of Wilcox was true and treat it as conclusive.

No authority has been cited by the Government which justifies in any respect the statement made by the District Attorney to the Grand Jurors that all must be indicted or none. The fact that the Grand Jurors asked the question of the District Attorney implies that the Grand Jurors had concluded that one or more of the defendants should not be indicted. It also implies that after receiving the answer of the District Attorney, they indicted someone whom they believed to be innocent in order to catch someone whom they believed to be guilty. This is subjecting the innocent person to a

wrongful accusation in order to make a proper accusation against a guilty one.

Commonwealth v. McNary, 140 N. E. 255
United States v. Wells, 163 Fed. 313.

(Decided by the United States District Court for the District of Idaho.) In that case Mr. District Judge Whitson quoted from Mr. Justice Field in his famous charge to the Grand Jury to the effect:

> "The District Attorney has the right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence."

In the case at bar the District Attorney came into the middle of the deliberations of the Grand Jury and it may be assumed from the state of the record that the District Attorney materially influenced the deliberations of this Grand Jury.

20 Cyc. 1338.

> "But he cannot participate in the deliberations, or express opinions on questions of fact or as to the weight and sufficiency of evidence, or attempt in any way to influence the finding."

If the district attorney is to be permitted to do that which is conclusively shown in this record, then how can his conduct be differentiated from the most violent and flagrant denunciation or the most partisan argument made by any district attorney in the future. If one district attorney, even though acting in good faith, can argue a cause before a grand jury, then every district attorney may argue. If one district attorney may insist that if any one of four men is to be indicted, then the indictment must be against the entire four, what is to prevent the indictment of many innocent persons for the sole purpose of indicting a few guilty ones?

At one time it was thought that it was better for nine guilty to escape than for one innocent man to be convicted, but the theory seems to have been reversed in the procuring of this indictment, and, according to the instructions given

by the district attorney to this grand jury, the indictment of innocent persons was required in order that the indictment of guilty persons might be had.

It is conceivable that some, or all, of these four defendants may be either guilty or innocent. It is, likewise, conceivable that there may be different degrees of guilt, and that some of them may be guilty and others innocent.

Counsel for the Government in its brief says: (P. 14.)

> "The statement of the district attorney could only have meant that if the evidence involved some of the defendants in the conspiracy or substantive offenses, it involved them all."

We do not see how the district attorney could have meant or intended to convey any such thought as is contained in the above quotation, but we do say that even if the district attorney meant that if the evidence involved some of the defendants in the conspiracy or substantive offenses it involved them all, still, such a statement would have been misconduct of the grossest character. The conduct of four men is the subject for investigation on a charge of conspiracy. Two of them may be guilty of conspiracy but it does not necessarily follow that because the evidence involves two of them that it necessarily involves them all.

If it had been the opinion of the district attorney that the evidence involved all of them he had no right to give that opinion to the grand jury and the grand jury had no right to act upon it.

Even though this court might say from the evidence taken before the grand jury, if that evidence were before this court, that it justified an indictment against all of the defendants, still the conduct of the district attorney in expressing such an opinion to the grand jury would have been improper and unlawful because that would be substituting the opinion of the district attorney for the opinion of the grand jury. Even this court would not have a right to substitute its opinion for the opinion of the grand jury. Neither the district attorney nor any court may indict. That is the function of the grand jury and under the Constitution of the United States, it is submitted, that that function must remain protected inviolate until some other method of accusation is provided

by proper amendment of the Constitution of the United States.

For these reasons it is respectfully submitted:

FIRST. That the writ of error shall be dismissed because it is not authorized by any law of the United States.

SECOND. Because said writ of error, even though authorized by law, was not taken within time.

THIRD. Because it was not prosecuted with due diligence, even though authorized and taken within time, as required by the Act of March 2, 1907.

If this court shall find these matters against this defendant then, it is submitted, that the decision of the Trial Court must be affirmed on any one of three grounds: The presence of the stenographer in the grand jury room was unlawful and unauthorized. The conduct of the district attorney in summing up the testimony before the grand jury was contrary to law. And lastly, the deliberations of the grand jury were unlawfully interfered with by the district attorney; the latter instructing said grand jury that they must indict all of the defendants if they indicted any.

Respectfully submitted,

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